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In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-776

HARVILLE ROSE SERVICE,

Petitioner,

v.

KELLOGG COMPANY,

Respondent.

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

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To the Honorable Supreme Court of the United States:

Comes now Harville Rose Service, as Petitioner, and prays that the court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered September 29, 1971, in

the above styled cause, a diversity suit to recover damages for breach of contract.

As grounds for granting its petition, Petitioner would show the court as follows:

THE OPINION BELOW

The opinion of the court of appeals had not been officially reported as of the time this petition was printed, but it is reproduced in full as Appendix A, infra.

The federal district court in which the case was tried issued a memorandum in connection with its order overruling Respondent's motion for summary judgment which is also reproduced as Appendix B, infra, since it involves the point at issue here.

JURISDICTION OF THE COURT

The judgment of the court of appeals was rendered September 29, 1971, and is reproduced as Appendix C, infra.

A petition for rehearing in that court, timely filed October 12, 1971, was denied by order dated October 29, 1971. That order is reproduced as Appendix D, infra.

Jurisdiction of this court is invoked under 28 U.S.C. §1254 (1).

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the court of appeals properly interpreted and applied Texas' doctrine of "merger" and

its "parol evidence" rule so as to preclude recovery by Petitioner upon an oral contract between the parties, only a part of which was codified in a writing that was not intended to constitute the sole memorial of the parties' agreement.

2. Whether or not the court of appeals properly interpreted and applied Texas' doctrine of "merger" and its "parol evidence" rule so as to preclude recovery upon an oral contract which was partially performed by both parties to it when part of it was reduced to writing.

3. Whether the court of appeals erred in ordering the cause reversed and remanded "*** for entry of judgment in favor of defendant-appellant***" in view of the fact that Petitioner made an issue of and submitted, as a theory of recovery, a breach of the provisions of the written contract itself executed by the parties, which theory of recovery was left intact by the opinion below.

STATEMENT OF THE CASE

A. The Trial Court Proceedings:

Petitioner brought this suit against Respondent to recover damages for breach of a contract between the parties regarding the promotion of Petitioner's product (rose bushes) by Respondent as a premium offer on the side panel of the latter's cereal, Kellogg's Corn Flakes. (App. 8-10, 66.)*

*All "App." references are to the Appendix in the court of appeals, a certified copy of which is filed as part of the record in this court.

Jurisdiction was predicated upon diversity of citizenship. 28 U.S.C. 1332

The case was submitted, under a comprehensive general charge, to a jury which returned a verdict for Petitioner and assessed damages in the amount of $132,000.00. (App. 109.) Respondent's subsequently filed motion for judgment *non obstante veredicto* was denied (App. 119), and judgment for Petitioner was entered in the amount as found by the jury, plus interest and costs. (App. 119.)

B. Facts Pertinent to the Issues Presented:

Beginning in 1955, Harville Rose Service (a Tyler, Texas, business engaged in growing, processing and merchandising rose bushes) and the Kellogg Company (a national producer and merchandiser of breakfast cereals) entered into a contractual relationship whereby Kellogg offered Harville's product to the public as a "premium" for the return of a specified amount of money and a stipulated number of box tops from the package of cereal upon which the offer was printed. (App. 149-150.)

This contractual relationship proceeded upon an amicable basis and was renewed every year from 1954-55 through 1966-67. (App. 149.) As a general rule, each year's succeeding contract was negotiated between the parties in April to run through May of the following year. (App. 164-168.) The premium offer for a particular promotion would generally be made public in December, but it was necessary to negotiate the contract in advance so as to provide for the appropriate number

of rose bushes, to prepare the "package layout", to make provisions for filling orders, etc. (App. 165, 169-170.) The actual agreement or "contract" between the parties was *always* consummated at the April meeting although it was later confirmed in a "purchase order" usually issued in November or December following (App. 332), or, as Mrs. Harville testified:

> "Q. Now, Mrs. Harville, in this same five years period that we are talking about, by the time the April—by the time of the April meeting—either at that time or before that time—is it your testimony that you and the Kellogg Company had agreed with reference to the following year's promotion?
>
> "A. Yes.
>
> I—I don't recall at any time leaving a meeting there, during that time, and not feeling that we had a promotion going for the next year.
>
> "Q. All right.
>
> "A. Although, sometimes it would be later before we would have a formal confirmation on it." (Appendix 166-167.)

However, the April, 1967, meeting did not result in an agreement for the 1967-68 promotion (App. 181), apparently due to a dispute as to the price of the premium and whether or not Kellogg would "commit" itself to guarantee a certain number of sales under the offer. (App. 188-189, 193-194, 200-201.) In fact, Harville was informed after the April meeting, both by letter and by telephone, that Kellogg was not interested in promoting Harville's product on the terms offered. (App. 203, 205.)

Still, Mrs. Harville continued working on the project, and, on July 12, 1967, Mrs. Harville submitted, by mail, one final, improved, and vastly more appealing proposal which offered designated high grade rose bushes, an attractive package, and planting instructions for one dollar plus a box top. (App. 219-220.)

Kellogg apparently was quite pleased with this offer for some ten days later its representatives, Art Howells, called Mrs. Harville and offered her the side panel on 30 to 35 million boxes of Corn Flakes, the largest selling cereal in the United States. (App. 225, 661.) During telephone negotiations that day and the day following, Harville and Kellogg consummated this agreement:

(1) To promote Harville's rose bushes on the side panel of Kellogg's Corn Flakes (App. 225),

(2) That Kellogg would not "commit" itself to guarantee to Harville a certain number of premium purchases (App. 226),

(3) That Kellogg would not retain any option upon unsold premium items (App. 226),

(4) That there would be nothing on the back panel of Kellogg's Corn Flakes which would "*** detract from the rose bush offer ***" (App. 230), and

(5) Finally, and most important, that, except for the fact that the offer would be on a "non-commit" basis, the promotion of the offer would be handled "*** as it has always — as it had always been." (App. 226.)

The last mentioned agreement was doubly important and significant for this reason: Always in the past Kellogg had supported the rose bush premium offer via a massive radio and television campaign which generally began in the second or third week of January and ran through the eleventh or twelfth month of the year. (App. 232, 238-240.) This radio and television support was "*** a very vital element ***" to the success or failure of the premium promotion (App. 232); indeed, the presence or lack of such support was, as the evidence reveals, a *sine qua non* to total success or complete failure of the project; it was the one item without which the promotion simply could not be expected to succeed. (App. 240-243.) By analysis of the records kept during previous promotions, Mrs. Harville was able to detail graphically that the number of responses to a premium promotion bore a direct relationship to the number of times it was promoted on a media "spot". (App. 328-330.)

Thus, the continuance of media support was definitely included within—indeed, perhaps, the most important item in—the July, 1967, agreement that "*** everything else would be as it has always—as it had always been." (App. 226.)

And, let there be no mistake about it, the parties entered into, and fully consummated, a "contract" in-

cluding all the foregoing elements in July, 1967, or, as Mrs. Harville specifically testified:

> "Q. From what Mr. Howells said to you, or what you said to him was there any discussion between the two of you that you would be back in touch with each other or communicate with each other concerning whether or not the Kellogg Company was to use your roses and you were to handle the promotion for the following year?
>
> "A. No. No. No; we agreed there—we even discussed the fact that I would pick up a package at the super market and do a new lay-out on the side panel." (App. 227.)

There is no evidence at all that there was to be no contract between the parties until it was reduced to writing; there is no evidence that the contract's terms were to be controlled exclusively by a later writing; and there is no evidence that performance under the contract was to be abated until the "basic principles" of the agreement were spelled out in writing.

As a matter of fact, the parties immediately began performance of the contract after its July, 1967, consummation, to-wit: From Harville's standpoint (1) it immediately "ceased . . . efforts" to contract other premium promotions (App. 228), (2) it planted and made provision for 500,000 rose bushes to supply Kellogg customers (App. 275-277), (3) it prepared art work for the package lay-out (App. 229), (4) it ordered all necessary supplies to service premium orders (App. 22), and (5) it had printed planting instructions to accompany each premium ordered. (App. 22.) In performance

of its part of the bargain, Kellogg (1) prepared art work and advertisement copy for the offer (App. 545, 693-694), (2) it printed the premium offer on 30 to 35 million Kellogg's Corn Flakes boxes (App. 545), and (3) it made the premium offer public by shipment of the cereal boxes to retail outlets. (App. 545.) This performance encompassed the 1967 months of July, August, September, October, November and December, culminating in the shipment of cereal boxes just mentioned in December of that year. (App. 545.)

It was during the latter two months that the now infamous purchase order entered the picture. The order is dated November 17, 1967, and, presumably, was forwarded to Mrs. Harville about that time. (App. 78-79.) She did not sign it, however, until January, 1968, when its existence came up as an incident to a telephone conversation between Mrs. Harville and Kellogg's Glen Freeman. (App. 349-351.) The details of the purchase order are voluminous. Suffice it to say for present purposes (1) that the order did not contain, at least so Kellogg contends,* a specific obligation that it promote the premium offer via radio or television, and (2) it did not embody the agreement that the back panel of the cereal box would not detract from the rose bush offer. The contract does contain, at various places, several exculpatory "merger" clauses which are cited in the opinion at pages 4-6.

*As discussed at page 14, infra, Petitioner submitted an alternative theory of recovery on the premise that ¶19 of the purchase order did obligate Kellogg to promote the premium product.

That particular purchase order was not unlike other purchase orders which had been signed in years past, and the evidence favorable to the judgment is that such orders were considered by the parties to be a "* * * formal confirmation * * *" (App. 332) or a "* * * confirming order * * *" (App. 167); * i.e., that they were not intended to supersede the oral agreement, but simply to be a memorandum of it. As a matter of fact, there is evidence that, in years past, the purchase order was often "wrong" in that it did not embody the parties' actual agreement. (App. 332.) More important is evidence that "* * * sometimes there were things that maybe we understand among each other that were not written in [the purchase order]. * * *" (App. 333.) So, it is safe to say from the evidence that, in years past, the written purchase orders were not the complete memorial of the parties' entire agreement and were not intended to be; that the parties had never performed their contract according to the literal terms of the order; and that their initial oral agreements delineated both

Mrs. Harville did not, as the court of appeals implies, ever testify that " * * she realized that there was to be a written purchase order and that this would establish the 'basic principles' of the agreement." (Opinion 3.) What Mrs. Harville said was that there had been a written confirmation of the oral agreement in the past, but that it was often "wrong" (App. 332-333), and "* * * sometimes there were things that maybe we understood among each other that were not written in. But the *basic principles* of the order were written within it." (App. 333, emphasis added.) That, of course, is hardly testimony that the purchase order was to be the sole and controlling repository of the parties' agreement, or that it ever had been in the past. The court of appeals, obviously, has changed the tenor of that testimony, by wrenching from context, to support its judgment.

their total contractual obligations and their performance thereunder.

At this point it will be noted that even *before* the November 17 purchase order was signed, the parties' original, July, 1967, contract had been breached in one material aspect: When the Corn Flakes boxes were made public, they contained on the back panel a "Moon Garden" premium (App. 254) which directly competed with, and detracted from, the rose bush offer (1) by competing for the box top, (2) by appeal to children whose wishes could be expected to take precedence over their parents, and (3) by offering a premium which was almost three times (35¢ v. $1.00) less expensive than the rose bush premium. (App. 256-257.)

The second material breach of the contract matured after the purchase order was signed, although it had been in the making since September of 1967. It was in mid-January, 1968, that Mrs. Harville learned, in conversation with Glen Freeman, that no television or radio support had been scheduled to support the rose bush offer (App. 245-247); in fact, none had been planned at least since September, 1967 (App. 650), when Kellogg contracted with the networks for television advertising for all its products. (App. 700.) As it actually developed, no media support—television, radio, or otherwise—was provided by Kellogg to promote Harville's product. (App. 699.)

Naturally, without such support, and devastated by competition from the "Moon Garden", the rose bush promotion failed miserably. Whereas in previous years, with media support and no competing premium, Harville had filled for Kellogg as many as 370,000 premium orders (App. 730), the 1967-68 promotion returned just slightly over 48,000 (App. 283), though a normal rate of return on 30 to 35 million offers on Kellogg's Corn Flakes should have yielded 750,000 responses. (App. 296.) As a result, Harville sustained an actual loss of $96,000.00. (App. 304) and an estimated revenue loss of approximately $240,000.00. (App. 308, 472:)

Subsequent to this total failure, Kellogg virtually acknowledged that it was accomplished through its breach of its oral agreement to promote the product as it had in the past via television and radio support. In a letter to Mrs. Harville the company stated:

> "* * * It is also apparent that the Rose Bush Offer, featured on the side panel of Corn Flakes this year, did not have the necessary pull to repeat it during the 1968 and 1969. It is apparent that the Rose Bush Offer — without television support — has a very small effect on the total product sale. * * *" (App. 376.)

Hence, this suit was brought to recoup those losses which are so easily traceable to Kellogg's failure to honor its commitments.

C. The Theories of Recovery:

Petitioner proceeded in the case upon two theories of recovery:

First, it contended that it was not the intent of the parties that the November, 1967, purchase order be the sole repository of their agreement; that whether or not it was an integrated, complete contract was a question for the jury; and, if the jury so found that it was not, Petitioner had a right to prove the July, 1967, oral commitments and recover for their breach.

That theory was, quite properly, submitted by the court contingent upon the jury's resolution of the "integration" or "merger" question in this language:

> "Now, if you find, as contended by defendant, that the written contracts were intended by the parties to represent their entire agreement, you will find in favor of the defendant as to plaintiff's allegations of breach of any oral agreements, and you will [sic] consider plaintiff's allegations of breach of any oral agreements, and you will consider plaintiff's allegations only as respects the written contract. On the other hand, if you should find that the written agreements were not intended to supersede the prior oral agreements, then you may consider whether there has been a breach by defendant of the oral agreements, if you find that such oral agreements actually were made. The burden of proof is on plaintiff to prove that the parties did not intend that the written contracts should supersede the oral agreements, if any.
>
> * * *
>
> "Therefore, if you find from a preponderance of the evidence that it was the intention of the parties to this contract that the agreement was to be complete, binding and effective when orally agreed to, and that the parties did agree to the terms of the

contract, and if you further find from a preponderance of the evidence that the defendant subsequently breached that contract, then your verdict shall be for the plaintiff." (App. 770-771, 776.)

In addition to that, Petitioner took the position (App. 84) that the following paragraph of the purchase order itself obligated Respondent at least to furnish radio and television support and that such written obligation itself was breached:

> "19. Time shall be of the essence of the contract evidenced by this purchase order. Kellogg Company expects to make large expenditures and commitments in connection with its advertising and sales promotion activity both before and after the date or dates on which delivery of premium items is required hereunder, and its plans with respect to such activity are based upon delivery by you of premium items in accordance with the delivery provisions of this purchase order."

That theory of recovery was submitted succinctly in this language:

> "It is further contended by the plaintiffs that, in addition to the oral agreement to furnish television support for the rose bush premium offer, defendant agreed in writing to do so in connection with Paragraph 19 of the written contract, which provides that "Kellogg Company expects to make large expenditures and commitments in connection with its advertising and sales promotion activity both before and after the date or dates on which delivery of premium items is required hereunder." This interpretation of the contract is denied by the defendant, which contends that television support of the premium offer was not contemplated by such provision of the contract. If you should believe from a

preponderance of the evidence that such television support of the premium offer was agreed to by the parties, and if you should further find from the evidence that defendant failed to furnish such television support, then you will find for the plaintiff; otherwise, you will find for the defendant as to such contention." (App. 776-777.)

The charge was not tested by special interrogatories.

D. The Opinion of the Court of Appeals:

Relying upon practically every fact* (and there were very few of them) which it could muster that was unfavorable to the verdict and judgment of the trial court, the court of appeals engaged in what it deemed to be an *Erie* disposition of Texas' law of merger and "parol evidence". With much of the opinion consumed by non-controversial quotations (Opinion 11) from intermediate Texas appellate courts (with no writ history in the

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*See the entire discussion at page 12 of the opinion. Of course what occurred after execution of the purchase order, and what Harville may or may not have "complained" about after the breach of the oral obligations (and § 19 of the order itself), has no bearing upon what the parties intended the writing to be or upon what their obligations were. The fact that the court would devote one full page of the opinion to such irrelevant facts, not in support of the judgment, indicates that the court has engaged in trial de novo rather than appellate review.

Note also how the court again seriously misapprehends the facts when it states, "* * * on two occasions Mrs. Harville requested that the number of rose bushes she be required to have available be reduced, and on both occasions she requested a written change order." (Opinion 12.) What Mrs. Harville really testified is found in the following:

"Q. Was that largely the reason for your requesting the written change orders, because you were familiar with that provision of the basic purchase order?

"A. No, Sir.

"Q. All right.

"A. I didn't request it in writing, sir." (App. 349.)

Texas Supreme Court), the court of appeals summed up its holding by stating:

> "Applying the standard recited in *Hubacek* and the Restatement of the Law of Contracts to the instant case, it is clear that the oral promises which appellee alleges were made are inconsistent with the written purchase order which specifically purports to be complete and which deletes all prior oral agreements.* * *"
>
> * * * *
>
> "Furthermore, there was no separate consideration for the alleged oral agreements and the alleged oral statements were not such as would be normally made as separate agreements."
>
> "The facts of the case *sub judice* thus cry out for application of the parol evidence rule and the doctrine of merger as Texas courts have applied them many times in the past* * *."

Under the most authoritative Texas cases, that holding is erroneous to the nth degree as the following argument and authorities easily demonstrate:

REASONS FOR GRANTING THE PETITION

The opinion of the court of appeals is a flagrantly sophomoric attempt both to discern and to apply the Texas law of "merger" and "parol evidence". Indeed, the court's analysis of the law and its application to the facts is so superficial and misses the point of this case to such a degree that there is little cause to attempt to pick the opinion apart piece by piece, for that would, to put it colloquially, be arguing about apples when it is oranges that are really involved. Texas courts have laid

down very definite guidelines relative to the local doctrines of merger and parol evidence dating back to the early 1800's and, since those principles are so easily defined, rather than belaboring the many fallacies in the opinion, Petitioner believes it can best demonstrate the manifest error below by delineating the principles which the court should have applied to the facts of this case, to-wit:

A. Under Texas law, the parol evidence rule does not apply to a written instrument unless the writing is a complete integration, and that is a question of intent properly resolved by the jury.

Texas never has indulged the proposition that contracts must be wholly in writing to be enforceable; it always has, and does to this day, recognize that contracts may be completely oral or partly oral and partly written. *C. A. Bryant Co. v. Hamlin Independent School District, 118 Tex. 255, 14 S.W.2d 53, 56 (1929); 13 Tex. Jur. 2d 216-217, "Contracts," §74 (1960).* If a writing exists which covers the subject matter of a contract, it may be, or it may not be, the sole memorial of the parties' agreement, i.e. an "integration" or "merger" of their prior negotiations and agreements. The question of integration vel non of a contract into a writing depends, in Texas, exclusively upon what the contracting parties intended the writing to be, *Jackson v. Hernandez, 155 Tex. 249, 285 S.W.2d 184, 190-191 (1955); Caprito v. Grisham-Hunter Corporation, 128 S.W.2d 149, 154 (writ*

dism., judgm. cor.), or, as the court in the latter case put it:

> "* * * Merger is the absorption or extinguishment of one contract in another and is largely a question of intention. * * * Mergers are not favored and will not be decreed when inconsistent with the evident intention of the parties. * * * It appears to be well settled that equity will not decree mergers of estates in the absence of a showing of intention.* * *" (128 S.W. 2d 154.)

In Texas, if a writing does not merge or integrate the parties' entire agreement, then, the writing is not rendered sacrosanct and oral agreements covering the same subject as the writing remain as enforceable as the writing itself, even if they contradict it. That proposition was established as early as 1877 when the Supreme Court of Texas said in *Thomas v. Hammond, 47 Tex. 42, 52 (1877)*:

> "* * * 'the rule, that contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument,' does not apply, 'where the original contract was verbal and entire, and a part only of it was reduced to writing.' * * *" (47 Tex. 52.)

The sum and substance of the Texas rules was aptly stated more recently in *Jackson v. Hernandez, supra, 155 Tex. 249, 285 S.W. 2d 184 (1955)*, as follows:

> "The parol evidence rule as commonly expressed is to the effect that in the absence of fraud, accident or mistake, parol or extrinsic evidence is not admissible to contradict or vary the terms of a written instrument. 32 C.J.S., Evidence, §851 p.

> 784. Professor Wigmore points out that while this states the effect of applying the rule, it can never serve as a test to determine in the first instance whether the rule is applicable. He suggests, as a more accurate statement of the rule, that 'when a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.' He also indicates that in determining the applicability of the rule, 'the fundamental question is as to the intent of the parties to restrict the writing to specific elements or subjects of negotiation; and if that intent existed, then the other subjects of negotiation can be established, even though they be (as they usually are) different from the writing.' Wigmore, Evidence, 3rd Ed. 1940, Vol. IX, p. 76, Sec. 2425, p. 102, Sec. 2431." (285 S.W. 2d. 190-191.)

Thus, the question of "intent" to integrate or merge is at the threshold of any Texas "parol evidence" problem. As the foregoing quotation from *Jackson v. Hernandez* makes clear, unless and until that question is answered one way or the other, one simply cannot proceed to determine whether Texas' parol evidence rule is applicable. And that question, in the local jurisdiction, is one of fact which generally is to be resolved by the jury; even the Fifth Circuit has conceded that in prior application of Texas law. *Halliburton Oil Well Cementing Co. v. Millican, 171 F.2d 426 (5th Cir. 1948); Aetna Insurance Co. v. Neville G. Penrose, Inc., 304 F.2d 612, 616 (5th Cir. 1962).* As the quotation from the charge (page 13, supra) makes clear, this case was submitted in accord with the foregoing principles; the jury was not

permitted to give any credence to the July, 1967, oral commitments until it *first* decided whether or not "*** the written contracts were intended by the parties to represent their entire agreement ***". (App. 770.)

Was there, then, a fact issue as to the parties' intent to integrate their entire contract into the purchase order? Of course there was. The evidence of it is replete in the virtually undisputed testimony (1) that "*** we agreed there ***" in July of 1967 to a complete contract, (2) that, in the past, written evidence of the contract was considered to be merely a formal confirmation of the oral contract, (3) that, in the past, oral agreements were abided by even though they were not "*** written in ***" the purchase order, and (4) most important, from the fact that, during the year in question, the parties actually performed the oral contract for five and one-half months before the writing came into existence. (Would Kellogg have made public 30 to 35 million offers involving potentially $750,000.00 in sales when, as it now contends, it had no contract at all because the purchase order had not been signed?)

Therefore, the vital preliminary issue which determines this whole lawsuit (integration) was raised, it was submitted to the jury, and from the verdict, it was apparently resolved in Petitioner's favor, i.e. that the purchase order was *not* intended to be the sole evidence of the parties' agreement. With that issue thus answered, Texas so-called parol evidence rule passed out

of the case under the directive of *Jackson v. Hernandez, supra*, and, under the rule of *Thomas v. Hammond, supra*, the July, 1967, oral agreements could be both proved and their breach enforced.

With the controlling Texas law so easily defined and so simply applied, it is difficult, if not altogether impossible, to determine just how the court of appeals reasoned itself into holding that Texas' parol evidence rule did apply. Indeed, it can hardly be said that it "reasoned" its way into that position at all; rather, after quoting from the nonauthorative cases of *Arkansas Oak Flooring Co. v. Mixon* and *Ragland v. Curtis Mathes Sales Co.* (Opinion 7, 10), the court proceeds to hold on an *ad hoc* basis that the "* * * facts of the case *sub judice* thus cry out for application of the parol evidence rule and the doctrine of merger as Texas courts have applied them many times in the past * * *" (Opinion 11), stating no legal or factual basis *why* those rules were applied.

There are several speculative bases for the court's opinion.

First, it could have concluded that the evidence established as a matter of law that the parties did intend to constitute the purchase order a total integration. That position, if it is what the court holds, is, we believe, amply refuted by the evidence already cited at page 20, supra.

Or, the court could have concluded that the presence of merger clauses in the purchase order alone made it

the sole agreement by which the parties were bound. If it held that, it is very much at odds with *Bell v. Mulkey, 16 S.W. 2d 287 (Tex. Com. App. 1929)*, the most authorative case cited by either party to this suit; as a matter of fact *Bell v. Mulkey* is so much in point that it alone could have been cited to affirm the trial court judgment. In the case, Western Silo Company sued Mulkey on his note, and Mulkey cross-acted for cancellation of the note and damages. The disputes arose from the sale of certain silos to Mulkey by a representative of Western. The silos in question had, in fact, been delivered to another purchaser in Chillicothe, Texas, but refused. Mulkey agreed with Western's agent to purchase those silos if said agent would procure their erection on Mulkey's premises. Thus, orally agreeing Western's agent had Mulkey sign as a "matter of form", a "written order" which contained various exculpatory statements including this merger clause:

> "* * * it is understood that this order constitutes the entire and only agreement between the parties hereto * * *". (16 S.W. 2d 290.)

The written order contained none of the oral agreements regarding erection of the silos which, it turned out after Mulkey executed his note in payment therefor, were improperly erected and collapsed, all to Mulkey's damage.

Western sought to avoid responding in damages for improper erection of the silos on the ground that their agreement to do so was no part of the written order which had to be conclusive of the matter since it contained a merger clause. Properly deciding that the parol evidence rule did not preclude proof that the written order was not the entire contract (although it said it was), the Texas Commission of Appeals made the following holding applicable in all respects to the present case:

> "If (contrary to Mulkey's contentions) the 'order' became, in any sense, obligatory, then a situation is presented wherein parts of the arrangement were given evidence in writing and parts were left unwritten—a situation in respect to which the 'parol evidence rule' does not so operate as to exclude extrinsic proof of the 'unwritten' parts. * * *
>
> * * *
>
> "* * * In pleading then, there was tendered issue of fact as to whether Mulkey made and acted upon a 'verbal' agreement or one evidenced in writing and about the terms of the 'verbal' contract if such was the kind he made. In our opinion * * *, Mulkey had a right to prove, if he could, that the so-called 'written contract' was not intended to become (and therefore did not become) effective, but that the transactions were intended to be and were governable by terms of the 'verbal' contract. The 'parol evidence rule' . . . does not preclude evidence showing that a writing was not delivered 'as a present contract' or that there was never any 'concluded, binding contract' (in writing) 'entitling the party who claimed the benefit of it to enforce its terms.' * * *" (16 S.W. 2d 290-291.)

Not only does *Bell v. Mulkey* refute any contention that a merger clause *alone* renders a writing inviolate,* it typifies the proper approach to a problem like the one involved here—an initial determination of whether or not the writing was intended by the parties to be the sole evidence of their agreement, and then proceeding from there. It will be noted that, despite its compelling applicability, *Bell v. Mulkey* is very conspicuously ignored by the court of appeals.

Instead, the court chooses to give credence to the line of cases which follow and apply the rules announced in *Hubacek v. Ennis State Bank, 159 Tex. 166, 317 S.W. 2d 30 (1958)*, which, if anything, underscores just how badly the court of appeals has misapprehended this case. *Hubacek*, and cases which follow its elaborate rules, apply to a situation where an oral agreement is attempted to be enforced in conjunction with a contract which has been found to be, or is conceded to be, a *fully integrated contract*—the very fact in *dispute* here. *Hubacek* makes perfectly clear in its inception that the rules announced in it apply only when "*** parties have concluded a valid integrated agreement in respect to a particular subject matter ***". (317 S.W. 2d 32), and, throughout the opinion, the rules announced are made applicable *only* to what the opinion describes as an "integration" or an "integrated con-

*Other Texas cases to the same effect: *C. V. Hill & Co. v. Parker, 145 S.W. 2d 330 (Tex. Civ. App., 1940, no writ), and Price v. Advance-Rumley Thresher Co., 264 S.W. 113 (Tex. Civ. App., 1924, no writ.)*

tract". (317 S.W. 2d 33.) But, on the contrary, the whole question in *this* case is whether or not the writing was an integrated contract, and until that issue is resolved, the *Hubacek* rules have no application whatsoever.

Note that the court of appeals blithely overlooks that fact and procedes to apply the Hubacek rules—whether the oral contract is contrary to the integration, and whether it was made for separate consideration or is one the parties naturally would have made—and, having determined that those tests are not met, it finds the parol evidence rule to be applicable, overlooking altogether the issue as to whether or not the written contract is truly an integration. Thus, the court of appeals has been caused to test the enforceability of the Harville-Kellogg oral agreements upon a set of rules which, by their own terms do not, and were never intended to, apply to the facts of this case. That is why Petitioner implied at the beginning that the court of appeals has judged oranges by whether or not they qualify as apples.

To sum up, therefore, Petitioner says that: (1) The parol evidence rule in Texas applies only to an integrated contract, (2) that there was a dispute in this case as to whether the written purchase order was an integration, (3) that the jury's resolution of that dispute is supportable in the evidence, and (4) the integration dispute having been resolved favorable to Petitioner, the parol evidence rule does not apply to pre-

clude proof of and enforcement of the July, 1967, oral commitments. The court of appeals was manifestly in error in holding to the contrary.

B. Texas' merger doctrine does not apply to a contract which is partially performed at the time a writing covering the same subject matter is executed.

An equally compelling reason why the purchase order did not merge and extinguish the July, 1967, oral agreements is found in the deeply rooted Texas rule that merger or integration applies *only* to contracts which are executory (i.e., unperformed) when the subsequent writing is executed. The prevailing Texas rule is stated succinctly in *Fisher County Pipe Co. v. Snowden & McSweeny Co., 143 S.W. 2d 675, 680 (Tex. Civ. App., 1940, no writ)*:

> "'An oral agreement is merged in a subsequent written one only where the oral agreement is executory on both sides. A new agreement, although reduced to writing, does not necessarily as a matter of law show that a formal verbal agreement under which rights have already vested is rescinded or merged in the new bargain. That an oral contract was merged into a written one does not affect a party's right to recover damages for a breach of the oral contract while it was in force. * * *'" (143 S.W. 2d 680.)

Other cases which announce the same rule are *McCall v. Texas Dragline Service Co., 188 S.W. 2d 243, 246 (Tex. Civ. App., 1945, writ ref. w.m.); Kahn v. Ilitzky, 107 S.W. 2d 1015, 1016 (Tex. Civ. App., 1937, writ ref. w.m.);*

and *Cotulla v. Barlow, 115 S.W. 294, 299 (Tex. Civ. App., 1909, no writ).*

It will be recalled, from the facts cited at pages 8-9, supra, that *both* parties had substantially performed the oral premium promotion contract before the purchase order was ever signed. As a matter of fact, when that execution occurred in January of 1968, Kellogg not only had performed, it had done everything that it was going to do under the contract. *

The Texas rule, so clearly announced in the above cases, is fully applicable here; the parties performance precludes merger into the purchase order; and it permits suit upon a breach of the July oral agreements.

While Respondent has huffed and puffed, it has never been able to successfully blow down those cases. The court of appeals apparently could not escape them either, and, choosing discretion over valor, it avoided them by application of the age-old maxim from child psychology that, if ignored, a problem will gradually go away. Petitioner must respectively insist, however, that the foregoing cases do exist; that their rule is applicable in Texas today; and that they do authorize Petitioner's cause of action and its recovery upon the contract as made in July of 1967.

This means, therefore, that the subsequent execution of the purchase order by Harville was wholly without consideration, contrary to the court of appeals ridiculous assertion that there was " * * no separate consideration * * *" for the oral agreements. (Opinion 11.)

C. In no event can this case be reversed and judgment rendered for respondent, because Petitioner still may recover on its theory alleging breach of ¶ 19 of the purchase order.

While Petitioner would hope that this question need not be reached at all, the most surprising (indeed, alarming) holding below is the court's order that the trial court judgment be reversed and remanded "* * * for entry of judgment in favor of defendant-appellant" (Opinion 13.) Even if it could be concluded that the doctrines of merger and parol evidence preclude enforcement of the July oral agreements, still, the court has left intact Petitioner's theory of recovery based upon a breach of ¶ 19 of the writing itself, and, therefore, Petitioner is entitled to proceed to the jury on that theory of recovery alone.

Should Respondent take the position in this court that ¶ 19 is not specific enough to obligate it to provide radio and television support, Petitioner would reply that Texas law, under either of two theories, permits amplification of the clause by extrinsic evidence so as to bring it in accord with the intention of the parties.

Under the first theory, the clause could be considered ambiguous, thus, permitting its clarification by prior extrinsic circumstances. *Magnolia Warehouse & Storage Co. v. Davis & Blackwell, 108 Tex. 422, 195 S.W. 184, 185 (1917).*

Under the second theory, since the paragraph seemingly contemplates some promotion of the premium

products, but fails to particularize it, the writing can be considered incomplete and subject to being made whole and clarified by the parties' prior negotiations and agreements. *Butterfield Sales Co. v. Armstrong, 278 S.W. 2d 194, 199 (Tex. Civ. App., 1954, writ ref., n.r.e.); Hardin v. James Talcott Western, Inc., 390 S.W. 2d 517, 519 (Tex. Civ. App., 1965, writ ref., n.r.e.).*

The court of appeals has, therefore, fundamentally erred in ordering the rendition of judgment in favor of Respondent in the face of a perfectly viable theory of recovery upon the writing which the court says constitutes the contract between the parties. Compare *United States v. Morow, 182, F. 2d 986, 989 (C.A.D.C. 1950).*

CONCLUSION AND PRAYER

It is true that this diversity case involves only the proper interpretation of local law. As early as 1964, the Fifth Circuit had begun to speculate that "**** our decision in a diversity case is for all practical purposes final and irretrievable ***". *United Services Life Insurance Company v. DeLaney, 328 F. 2d 483, 487 (5th Cir. 1964)*, concurring opinion. From the monstrous result reached in this case it now appears that the court below is quite confident that no further appellate review will be accorded in a case of this nature.

While Petitioner is certain that loftier matters are pressed upon the court from the standpoint of practical and academic gravity, this particular case, from Petitioner's standpoint, is literally a matter of economic

life and death for Kellogg's failure to honor its commitments for the 1967-68 premium promotion not only caused Petitioner serious financial loss, but caused it to collapse into bankruptcy, and the lower court's rendition of judgment for Respondent leaves this Petitioner nowhere else to turn. In such situation, Petitioner remains confident that this court will not fail to exercise its Constitutional and statutory jurisdiction where the judgment below evidences such a complete abdication of Erie responsibilities. It is suggested that reversal of the judgment below could be accomplished by summary opinion upon granting of the petition.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this petition for writ of certiorari be granted, and, upon final hearing, that the judgment of the court of appeals be reversed and that of the trial court affirmed.

Respectfully submitted

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Attorney for Petitioner

Of Counsel:
DONALD CARROLL
RAMEY, BRELSFORD, FLOCK, DEVEREUX & HUTCHINS

CERTIFICATE OF SERVICE

It is hereby certified that three (3) true and correct copies of the foregoing petition for writ of certiorari have been served upon counsel for Respondent by placing the same in the United States post office, first class postage pre-paid, and properly addressed to counsel of record, Mr. Charles Potter, Peoples National Bank Bldg., Tyler, Texas 75701, on this the 9th of December, 1971.

MIKE A. HATCHELL

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29319

HARVILLE ROSE SERVICE,
Plaintiff-Appellee,

v.

KELLOGG COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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(September 29, 1971)

Before COLEMAN, INGRAHAM and WILKEY,*
Circuit Judges.

INGRAHAM, Circuit Judge: This diversity suit was brought by plaintiff-appellee Harville Rose Service against Kellogg Company, defendant-appellant, for the breach of a contract covering a rose premium advertising campaign to be used by appellant in the sale of its product, Kellogg's Corn Flakes. The principal issue here involved relates to application of the "parol evidence" rule. Because we find that this case calls

*Of the District of Columbia Circuit, sitting by designation.

for application of the parol evidence rule under Texas law, we reverse the judgment of the district court.

Appellee Harville Rose Service was engaged in the business of growing, processing and merchandising rose bushes. Beginning in 1955 appellant Kellogg began to feature on certain bran cereal cartons a premium offer of Harville Rose Service, whereby the purchaser of the cereal carton could obtain a rose bush by compliance with the terms printed thereon. This practice continued through the year 1968, at which time the current dispute arose.

Mrs. Neal Harville, who for the most part ran the rose service, testified that the relationship between the parties had always been pleasant until the 1968 promotion. However, from April to July of 1967, when negotiations were taking place for the 1968 promotion, she testified that the atmosphere was not the same as before and that the Kellogg people were not as friendly or receptive.

Mrs. Harville feared that the year 1968 would not be a profitable one for her business and thus asked for a higher price to be put on the roses. The Kellogg agents strongly disapproved of this and made various demands of their own. These included a 1¢ rebate on all rose bushes sold and a promotion on a "non-commit" basis. In other words, unlike all prior years Kellogg was refusing to guarantee that she would sell a certain number of rose bushes. Mr. and Mrs. Harville

expressed the realization that this would leave them "at their [Kellogg's] mercy." Appellant Kellogg, however, soon informed appellee that it had decided not to carry on the promotion at all, mainly because even on a "non-commit" basis the price was too high. Nevertheless, Mrs. Harville persisted, and sent to appellant suggestions for new packaging, lay-out, etc. She stated that Kellogg's agent, Mr. Howells, finally offered by telephone to place her premium on a side panel of Kellogg's Corn Flakes. Although the basic details were worked out, i.e., the price, the location on the side panel and the product, Mrs. Harville testified that she realized that there was to be a written purchase order and that this would establish the "basic principles" of the agreement.

There had always been a confirming order in writing in their past dealings. The order for the 1968 campaign was executed by the Kellogg Company and sent on November 17, 1967. Mrs. Harville, having apparently misplaced the order, called a Kellogg representative to discover why she had not received the order. Having been informed that it had been sent, she located, signed and returned it in January 1968.

Appellee asserted in the trial below that the oral discussions in July 1967 gave rise to binding agreements which were not included or merged into the written purchase order. Appellee alleged that the following oral promises were made and subsequently breached.

(1) That with certain exceptions, the 1968 promotion would be handled "as it had always been." Appellee interpreted this promise to include television support.

(2) That the appellant Kellogg would "do a good job" in the promotion.

(3) That there would be nothing on the back panel of the corn flakes package which would "detract from" the rose bush offer.

The district court permitted the jury to determine whether or not the written order was intended to supersede the alleged oral agreement. The jury returned a verdict in favor of Harville Rose Service in the amount of $132,000.

On this appeal appellant asserts that the district court erred in holding that a written purchase order contract signed by appellee and appellant did not supersede and merge any prior oral agreements and negotiations between the parties, and in submitting to the jury the question of the merger of prior oral agreements into the written purchase order contract. Appellee primarily contends that whether or not the written purchase order was the sole memorial of the parties' agreement was a matter of intent properly submitted to the jury and that extrinsic evidence is admissible to establish that the writing is not the sole memorial.

The written purchase order dated November 17, 1967, contained the following introductory paragraph:

"Please enter our order for the following, subject to terms and conditions on face and back hereof."

Then follows paragraph 1 which, among other things, identified six varieties of roses.

Paragraph 2 contained the following:

"You shall have at least two hundred and fifty thousand premium items available for orders from customers of Kellogg Company products as set forth below by January 1, 1968 and you shall be ready to start shipping premium items to customers of Kellogg Company's products on that date."

Paragraph 3 provided:

"Kellogg Company will offer the 'Queen of the Garden' promotion on the side panel of certain of its cereal cartons which will be shipped (subject to Kellogg Company's revisions) from approximately December 1, 1967 to January 31, 1968."

Paragraph 4 stated:

"Kellogg Company's sole responsibilities hereunder are set forth in the preceding paragraph."

On the front page, near appellant's signature, was the following:

"The terms and conditions on the back hereof are a part of this offer to purchase. The terms and provisions of this offer shall constitute the entire contract for the purchase and sale of the goods and

for services specified above. No oral commitments or changes are authorized."

It is patently clear that Mrs. Harville read these provisions of the contract and was quite familiar with them.

This court is bound in this diversity case to apply the parol evidence rule as the state court would. *Freeman v. Continental Gin Co.*, 381 F. 2d 459, 463 (5th Cir., 1967). Appellee's case is foreclosed primarily because of an interworking of the doctrine of merger from the law of contracts, and the parol evidence rule, which is not really a rule of evidence but rather a substantive rule from the law of contracts. Generally, the doctrine of merger holds that all prior and contemporaneous negotiations and promises are absorbed or merged into a written contract. This occurs when the oral product of the negotiations is subsequently reduced to writing, and by virtue of the writnig and merger, no prior or contemporaneous statements can be shown to vary or contradict the writing. *Don Drum Real Estate Co. v. Hudson*, 465 S.W. 2d 409, 412 (Tex. Civ. App., Dallas, 1971, no writ); *Albers v. Schumacher Co.*, 314 S.W. 2d

On the back of the front page were the following clauses:

"To the extent that this order may constitute an acceptance or confirmation of any offer, proposal or contract, by or with Seller, said acceptance or confirmation is expressly conditioned upon the assent of Seller to all of the provisions hereof and to the deletion from said offer, proposal or contract, of any and all provisions which are not herein specifically accepted by purchaser. Acceptance of this order shall constitute assent.

"No variation in any of the terms, conditions, deliveries, prices, quality, quantity, and specifications of this order, irrespective of the wording of Seller's acceptance or invoice, will be effective without Purchaser's written consent."

852 (Tex. Civ. App., Waco, 1958, no writ). The parol evidence rule excludes evidence of prior or contemporaneous negotiations and representations that are introduced to vary, add to, or contradict the terms of a valid written instrument, which the rule presumes embodies the complete agreement between the parties. *Hubacek v. Ennis State Bank*, 317 S.W. 2d 30 (Tex., 1958); *Bradford v. Brady*, 413 S.W. 2d 780 (Tex. Civ. App., Dallas, 1967, no writ). See also 23 Tex Jur. 2d, Evidence, §342 (1961).

The court, in *Arkansas Oak Flooring Co. v. Mixon*, 369 S.W. 2d 804, 806-07 (Tex. Civ. App., Texarkana, 1963, no writ), faced with a question concerning the merger of negotiations and alleged agreements into a written instrument, reviewed leading Texas cases and authorities as folows:

> "Judges and legal scholars of the highest rank have had occasion to remark on the seemingly indefinite and uncertain application of the rule of merger by the courts. The Supreme Court of this State in Hubacek v. Ennis State Bank, 159 Tex. 166, 317 S.W. 2d 30, discusses the parol evidence rule, its nature and application to the facts of the case before it. In doing so the court gave approval to rules and procedures that should be observed in the present case. The following is extracted for that purpose, to-wit:
>
> > "The parol evidence rule is not a rule of evidence at all, but a rule of substantive law. McCormick and Ray, Texas Law of Evidence, 2d., § 1601; 20 Am.Jur., Evidence, § 1100; 32 C.J.S. Evidence § 851.

> 'When parties have concluded a valid integrated agreement with respect to a particular subject matter, the rule precludes the enforcement of inconsistent prior or contemporaneous agreements. 17 Tex. Jur., Evidence §§ 352, 353 McCormick and Ray, supra, § 1601.
>
> "On the other hand, the rule does not preclude enforcement of prior or contemporaneous agreements which are collateral to an integrated agreement and which are not inconsistent with and do not vary or contradict the express or implied terms or obligations thereof. McCormick and Ray, supra, § 1631; 17 Tex. Jur., Evidence, § 370; Williston on Contracts, Rev. Ed., Vol. 3, § 642; Wigmore on Evidence, 3rd Ed., Vol. IX, § 2430, Page on Contracts, 2d Ed., Vol. 4, § 2191; Corbin on Contracts, Vol. 3, § 594.

'The rule with respect to proof and enforcement of collateral agreements is thus stated in the Restatement of the Law of Contracts, Vol. 1, § 240:

> "'(1) An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration, nor a written agreement by a subsequent integration relating to the same subject matter, if the agreement is not inconsistent with the integrated contract, and
>
> "'(a) is made for separate consideration, or
>
> "'(b) is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract."'

"In Professor Charles T. McCormick's 'Handbook of the Law of Evidence' (McCormick on Evidence), p. 441, Sec. 216, following a review of the many opinions expressed by courts and text writers upon the subject is this suggestion: 'Let the trial

> judge, after hearing the testimony as to the alleged oral agreement, including the evidence of substantiating circumstances, compare it with the terms of the writing, and if he considers that it is one which parties situated as these were would "naturally and normally" have recited in the writing itself, had they made and intended it to stand, then he will reject the evidence thus tentatively heard. On the other hand, if (in the terms of the Restatement) he concludes that the alleged oral pact is "such an agreement as might normally be made as a separate agreement by parties situated as were the parties to the written contract," then he will allow the evidence to go to the jury.' "

Applying the standard recited in *Hubacek* and the Restatement of the Law of Contracts to the instant case, it is clear that the oral promises which appellee alleges were made are inconsistent with the written purchase order which specifically purports to be complete and which deletes all prior oral agreements. See, e.g., *Ragland v. Curtis Mathes Sales Co.*, 446 S.W. 2d 577, 579 (Tex. Civ App., Waco, 1969, no writ):

> "The present written contract recites it is intended to 'set forth the relations' of the parties; that it contains their 'full agreement' and there are no others. Under these circumstances, the purported agreement which is the subject of the extrinsic evidence is inconsistent with the written contract, and the exception to the rule of exclusion is not available. Inner Shoe Tire Co. v. Williamson, Tex. Civ. App., 240 S.W. 330; Adams v. Bailey Transportation Co., Tex. Civ. App., 334 S.W. 2d 591, writ ref. n.r.e.; Inner Shoe Tire Co. v. Treadway, (5 Cir. 1923), 286 F. 838; 32A C.J.S. Evidence § 999, pp. 521, 523.

> "The parol or extrinsic evidence rule "is particularly applicable where the writing contains a recital that it contains the entire agreement between the parties' and the other recited provisions in the present written agreement."

Furthermore, there was no separate consideration for the alleged oral agreements and the alleged oral statements were not such as would be normally made as separate agreements.

The facts of the case *sub judice* thus cry out for application of the parol evidence rule and the doctrine of merger as Texas courts have applied them many times in the past. See, e.g., *Martin v. Coastal States Gas Producing Co.*, 417 S.W. 2d 91 (Tex. Civ. App., Eastland, 1967, no writ); *Aero-Gas Refining Co. v. Fish Tire Co.*, 137 S.W. 2d 191, 193 (Tex. Civ. App., El Paso, 1940, writ ref'd). Although oral negotiations are often the basis for a written contract, once they are reduced to writing with a merger clause the parties are presumed to have selected from these negotiations only the promises and agreements for which they choose to be bound. Otherwise the most carefully considered written documents could be destroyed by oral statements made during the ordinary give and take of negotiations.[2]

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[2]For example, appellee claims a breach because a "Moon Garden" display on the back panel of the cereal carton appealed to children and cost less money than the rose bushes and thus this "detracted from" appellee's offer on the side panel. This argument has no merit whatsoever. Mrs. Harville certainly could not expect that the back panel of the cereal carton would be left blank. Furthermore, it appears from the record that 70% of the consumers of Kellogg's Corn Flakes are adults and not children.

As we have indicated above, the appellee, facing growing competition and rising costs, found the situation in 1968 very different from past years and very difficult. This year marked the first time that the promotion had been relegated to a side panel of appellant's product. It was also the first time it was put on Kellogg's Corn Flakes, the first time the cost of the rose bushes had been as high, and the first time that two box tops were required instead of one in order for the purchaser to obtain appellee's product. Mrs. Harville, perhaps trying to remain in appellant's good graces, never complained about the lack of television support until it was too late. On the other hand, on two occasions Mrs. Harville requested that the number of rose bushes she be required to have available be reduced, and on both occasions she requested a written change order.

While not dispositive, we also note that Mrs. Harville attempted to set up another premium promotion with Kellogg for the spring of 1969, and in her proposal letter to Mr. Howells of the Kellogg Company she made no accusations of a breach of contract and did not suggest that Kellogg was responsible for the financial losses of Harville Rose Service. It was after appellee received a final turn-down on this 1969 proposal that the complaint in the instant case was filed in the district court.

Since there is no evidence of fraud, accident or mistake relating to the contract between the parties, and

in light of the parol evidence rule as applied in this opinion, we hold that the district court was required to withhold from the jury's consideration the evidence of the alleged oral promises. Accordingly, the judgment of the district court is REVERSED and the cause is REMANDED for entry of judgment in favor of defendant-appellant.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION

CIVIL ACTION NO. 4902

HARVILLE ROSE SERVICE,

v.

KELLOGG COMPANY,

ORDER OVERRULING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Harville Rose Service, is a rose grower. It seeks damages for an alleged breach of a contract whereby the defendant, Kellogg Company, was to place a premium offer of roses on the side panel of certain of its cereal packages, and the plaintiff was to ship roses to Kellogg customers who complied with the terms of the premium offer. The plaintiff alleges that its contract with defendant was partly written and partly oral, contending that it was orally agreed between the parties that the defendant would print nothing on the back panel of its cereal packages which would detract from the premium rose offer on the side panel, and that the defendant would provided television promotion for the premium rose offer, but that the defendant failed to comply with its oral obligations.

The defendant insists that the written purchase order, dated November 17, 1967, was the complete contract

between the parties, and that all prior and contemporaneous negotiations, whether written or oral, were merged into this writing. Defendant argues, therefore, that proof of plaintiff's allegations as to the oral stipulations of the contract are inadmissible under the parol evidence rule; and on this ground, defendant has moved for summary judgment in its own behalf.

The general rule is that when the parties have concluded a valid written agreement with respect to a particular subject matter, the parol evidence rule precludes enforcement of inconsistent prior or contemporaneous agreements not expressed in the writing. However, it has also been held that evidence is admissible to show the oral terms of a contract which had both written and verbal provisions. *Hubacek v. Ennis State Bank*, 317 S.W.2d 30 (Tex. Sup.Ct., 1958); *Rubin v. Adams*, 368 S.W.2d 42 (Tex. Civ. App., Amarillo, writ ref, n.r.e., 1963); *Pruett v. First Nat'l Bank of Temple*, 175 S.W. 2d 658 (Tex. Civ. App., Austin, no writ history, 1943); *Moore v. B. & M. Chevrolet Co.*, 72 S.W.2d 945 (Tex. Civ. App., Austin, no writ history, 1934).

In the case before the court, the written contract contains an integration or merger clause. But the parol evidence rule does not purport to establish the fact of integration; and until that fact is established, the rule does not have any legal operation. 3 Corbin on Contracts, 444-464, "The Parol Evidence Rule", § 582 (1960). It is clear that no merger can be effected when

the writing was intended only as a memorial of a part of the contract, as opposed to the final and complete contract. The intent of the parties is the controlling factor. *Aetna Ins. Co. v. Penrose, Inc.*, 304 F.2d 612 (5th Cir. 1962); 9 Wigmore, Evidence (3rd ed.), § 2400(5), p. 5, § 2431, p. 102.

Here, the record reflects, without contradiction, that in previous years, the premium offer had been supported by as many as eighteen and no less than eight television advertisements. Moreover, the prior written contracts between the parties had made no provision for such television advertising. In view of these facts, the alleged parol agreement relating to television advertising could well have been "such an agreement as might be made as a separate agreement by parties situated as were the parties to the written contract." *Hubacek v. Ennis State Bank*, supra. Because a fact issue as to the intent of the parties has thus been raised, summary judgment is inappropriate at this time. *Aetna Ins. Co. v. Penrose, Inc.*, supra.

Accordingly, it is ORDERED that the defendant's motion for summary judgment in the above-styled and numbered cause be, and it is hereby, overruled.

SIGNED and ENTERED this 12th day of August, 1969.

Original Signed By
Wm. Wayne Justice
UNITED STATES
DISTRICT JUDGE

APPENDIX C

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1970

No. 29319

D. C. Docket No. CA 4902

HARVILLE ROSE SERVICE,
Plaintiff-Appellee,

v.

KELLOGG COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

Before COLEMAN, INGRAHAM and WILKEY,* Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by Counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same

is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for entry of judgment in favor of defendant-appellant;

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Issued As Mandate:

September 29, 1971

*Of the District of Columbia Circuit, sitting by designation.

APPENDIX D

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29319

HARVILLE ROSE SERVICE,
Plaintiff-Appellee,

versus

KELLOGG COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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(October 29, 1971)

ON PETITION FOR REHEARING

Before COLEMAN, INGRAHAM and WILKEY,* Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

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*Of the District of Columbia Circuit, sitting by designation.

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In the Supreme Court of the United States

Supreme Court, U. S.
FILED
MAR 29 1972
MICHAEL RODAK, JR., CLERK

OCTOBER TERM ~~1971~~ 1968

No. ..... 71 - 776

UTAH PUBLIC SERVICE COMMISSION,

vs.

EL PASO NATURAL GAS COMPANY, et al.,
395 U.S. 464 (1969)

CASCADE NATURAL GAS CORP.,

vs.

EL PASO NATURAL GAS COMPANY,
386 U.S. 129 (1967)

Motion for Leave to File Motion for Modification of Mandate, to Shorten Period for Response Thereto to Enable Motion to be Heard During April Argument Session And for Opportunity to Present Oral Argument In Support of Said Motion

and

Motion for Modification of Mandate Issued In Above Cases to Enable the District Court to Determine Whether Divestiture Is the Appropriate Remedy Under the Present Circumstances

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Dated March 28, 1972

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Comes now Pacific Gas and Electric Company, intervenor in *United States v. El Paso Natural Gas Company*, et al., Civil Action No. C-143-57 in the United States District Court for the District of Utah, and presently an intervenor in *United States v. El Paso Natural Gas Company*, Civil Action No. C-2626, before the United States District Court for the District of Colorado now hearing the case on remand pursuant to the Court's order on remand in *Utah* and moves this Court for leave to file the annexed motion for modifi-

cation of mandate. This motion for leave to file should be granted for the following reasons:

In *United States v. El Paso*, 376 U.S. 651 (1964) at 662, the Court ordered divestiture "without delay." In his dissenting opinion, Mr. Justice Harlan said, "I know of no case where this Court has in the first instance itself directed divestiture or any other particular kind of relief." (at 664) There had been no reason for the trial court to explore the various possible remedies because it held that El Paso had not violated the Clayton Act.

The Attorney General then decided to settle the case and a consent decree was adopted as the judgment of the District Court. On appeal in *Cascade Natural Gas Corp. v. El Paso Natural Gas Company*, 386 U.S. 129 (1967), this Court set aside the consent decree and once again on remand ordered "divestiture without delay." (386 U.S. at 142) In its opinion therein, this court said: "No one, except this Court, has authority to alter or modify our mandate. *United States v. du Pont & Co.*, 366 U.S. 316, 325. Our direction was that the District Court provide for 'divestiture without delay.'" 386 U.S. at 136.

On remand the District Court selected Colorado Interstate Gas Company as the purchaser of the properties to be divested and adopted a plan of divestiture. The Utah Public Service Commission filed an appeal and later filed a motion to dismiss its appeal under Rule 60. This Court refused to permit Utah to withdraw its appeal and calling upon its "plenary power" to police its own mandate proceeded to review the District Court's order. The majority per Chief Justice Warren vacated the judgment of the District Court and remanded the case "for proceedings in conformity with this opinion" 395 U.S. 464, 472 (1969). The pertinent parts of the opinion relative to the mandate are included in the following:

"The purpose of our mandate was to restore competition in the California market. . . . (p. 470)

Our mandate directed complete divestiture (p. 471)

We have emphasized that the pinch on private interests is not relevant to fashioning an antitrust decree, as the public interest is our sole concern." (p. 471-472)

This history of the case demonstrates that it is the judgment of this Court which prescribed the remedy—divestiture—and which controls the proceedings to effect that remedy. If changed circumstances call for modification of the remedy, to serve the public interest, it is this Court which must act as long as its judgment allows no latitude for the District Court to adopt an alternative remedy to meet the new situation.

The threshold problem is that there is no explicit procedure for requesting modification of the judgment where this Court and not the District Court has prescribed the remedy. A District Court has the power to alter its judgment if changed circumstances indicate the desirability of doing so. Certainly then, this Court has the inherent power to do likewise with respect to its own mandates. The procedure for bringing changed circumstances to the attention of this Court to enable it to exercise this power must be a motion similar to that available for the purpose before a District Court, namely, a motion in nature of one under Rule 60 of the Rules of Civil Procedure. This is based on the broad extent of the Court's power which includes (a) the power vested in District Courts by Rule 60 and (b) the plenary power to police its own mandate.

Under Rule 60(b) of the Federal Rules of Civil Procedure: "On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding [for specified reasons]

and for any other reason justifying relief from the operation of the judgment."

In *Klapprott v. U.S.*, 335 U.S. 601, 614-615 (1948) the Court said:

> "Furthermore, 60(b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of . . . common law remedial tools. In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgment whenever such action is appropriate to accomplish justice."

This Court's rules must encompass similar relief when it has undertaken the role of the District Court and issued a judgment of divestiture as its mandate.

This motion need not rest solely on the analogy to Rule 60(b), for the Court has long held that it and it alone has the "authority to alter or modify" its own mandate, and that it has plenary power over such mandates. In *Continental Co. v. U.S.*, 259 U.S. 159, 167 (1921) this Court said:

> ". . . we have plenary jurisdiction to consider on our own motion whether our mandate has been complied with. We delegated to the District Court the duty of formulating a decree in compliance with the principles announced in our judgment of reversal, and that gives us plenary power where compliance has been attempted and the decree in any proper way is brought to our attention to see that it follows our opinion."

In *Cascade* (when the case at bar was before this Court for the second time) this Court said:

> "No one, except this Court, has authority to alter or modify our mandate. *United States v. du Pont & Co.*, 366 U.S. 316, 325."

and this was quoted with approval in *Utah* (the third stage of this case) 395 U.S. at 467. In the latter opinion, this Court held that the matter was properly before it by virtue of the filing of the jurisdictional statement by Utah even though appellant Utah filed a motion to dismiss its appeal under Rule 60 which, as Mr. Justice Harlan and Mr. Justice Stewart pointed out in their dissent, specifically provides that upon the filing of such a motion "the clerk shall, without further reference to the Court, enter an order of dismissal."

It is, thus, the settled procedure with specific reference to this litigation that this Court will entertain on its own motion a review of its own mandate if the matter is brought to the attention of the Court in any appropriate manner.

We submit, therefore, that this Court should accept for filing and consider the annexed motion for modification of mandate.

We request further that the motion for modification of mandate be decided at this term of Court, and, if the Court does not grant the motion *ex parte*, that it be heard during the April argument session of the Court, and that we be granted the opportunity for oral argument in support of said motion. If necessary to meet this time schedule, we request that the time for response to the annexed motion be limited to ten days.

Respectfully submitted,

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I

NATURE OF MOTION

This motion requests this Court to exercise its paramount and plenary power over its own mandate and is in the nature of a motion under Rule 60(b) of the Rules of Civil Procedure for partial relief from the order for divestiture mandated herein because:

(a) It is no longer in the public interest to give the divestiture order prospective application, and

(b) In particular the interests of the gas consumers in California (for whose benefit divestiture was ordered)

would be better served if a different remedy is applied. The District Court did not itself order divestiture. That was done by this Court; therefore, this is the only forum in which relief can be sought.

This Court has plenary power to police its own remand and hence the plenary power to alter its remand order when it finds that said order may, because of changed circumstances, be inequitable, undesirable in terms of the public interest, unnecessary to effectuate the policies of the Clayton Act under which said order was issued, and adverse to the gas consumers of California whose interest was to be served by divestiture.

II

SYNOPSIS OF POSITION

In *United States v. El Paso Natural Gas Company*, 376 U.S. 651 (1964), this Court held that El Paso acquired the stock of Pacific Northwest Pipeline Corporation in violation of Section 7 of the Clayton Act and, despite the subsequent merger of Pacific Northwest into El Paso pursuant to Federal Power Commission authorization (which this Court held should not have been given while the stock acquisition was the subject of litigation), ordered divestiture "without delay" *Id.*, at 662. A consent decree was thereafter entered by the District Court but on appeal, in *Cascade Natural Gas Corp. v. El Paso Natural Gas Company*, 386 U.S. 129 (1967), this Court set aside the decree and once again ordered "divestiture without delay." *Id.*, at 142. In the proceedings on remand the District Court adopted a plan for divestiture of the Pacific Northwest system to Colorado Interstate Gas Company. (618) On review of this order, in *Utah Public Service Commission v. El Paso Natural Gas Company*, et al., 395 U.S. 464 (1969) this Court rejected the District Court's plan and reiterated its order for divestiture of the properties of Pacific Northwest acquired in violation of the Clayton Act.

As late as 1969 when the case was last before the Court in *Utah*, divestiture still seemed to be the appropriate remedy. The dramatic change of circumstances since that time gives rise to our concern that pursuit of the original remedy would not achieve the intended objectives.

As the Court said in *Utah, Id.*, at 470; "The purpose of our mandate was to restore competition to California." The Court there also said: "We have emphasized that the pinch of private interests is not relevant to fashioning an anti-trust decree, as the public interest is our sole concern." *Id.*, at 471-472.

Under circumstances as they exist today, divestiture will harm California and the public interest. Divestiture will reduce California's position in the competitive arenas existing today.

Competition for markets no longer exist. *Markets compete for gas supplies.* The California market would be in a better competitive position if El Paso were not divested of the properties it acquired in violation of the Clayton Act, provided that an alternative remedy were to be adopted turning the acquisition into a vehicle for competition. The District Court should be freed from the shackles of the divestiture order so that it may adopt such a remedy if it finds it necessary in the circumstances to effectuate the policies of the Clayton Act and protect the interest of the gas consumers of California. To minimize time delay the District Court can use the record before it (supplemented if necessary) to determine the need for an alternative remedy and, if the record justifies such action, adopt the appropriate remedy. At the same time the Court may also select the applicant for acquisition and plan of divestiture to be followed if on appeal this Court were to hold, notwithstanding the changed circumstances, divestiture was the only acceptable remedy. El Paso's past misdeed should

not prevent this Court from permitting that to be done which is right today.

We do not ask this Court to undertake a detailed examination of the facts which would be appropriate for the District Court to consider in reviewing the appropriateness of the remedy. It is our request that the Court simply modify its mandate to unshackle the District Court from the narrow confines in which it now finds itself and give it the freedom to formulate the remedy most clearly in the public interest under present day conditions.

III

MOVANT AND ITS INTEREST

Movant, Pacific Gas and Electric Company, was an intervenor in *United States v. El Paso Natural Gas Company*, et al., designated Civil Action No. C-143-57 in the United States District Court for the District of Utah and, in the later stages of the case, petitioned for rehearing or in the alternative *sua sponte* modification of the opinion rendered herein on appeal in *Utah*.

Movant is now an intervenor in *United States v. El Paso Natural Gas Company*, designated Civil Action No. C-2626, in the United States District Court for the District of Colorado, where the Court is conducting divestiture hearings pursuant to this Court's order on remand in *Utah*.

California, unlike the East, Midwest and most other areas of the country, has depended upon natural gas for many years. Householders have long relied almost exclusively upon natural gas as the prime source of heat. The economy of the state developed with gas as the primary source of fuel. In most other areas, the availability and widespread use of natural gas is a post-World War II phenomenon. It displaced other fuels which had for years supplied the basic household and industrial requirements.

The District Court has issued an interim opinion on divestiture of gas reserves and has completed hearings on the plan of divestiture and the qualifications of the applicants for acquisition of the properties to be divested. Briefs on the plan and on the applicants' qualifications are to be filed on April 3, 1972.

The divestiture which would result if the District Court pursues the literal requirement of this Court's order will injure Movant and the other existing California gas customers of El Paso and the consumers they serve.

Movant has substantial and vital interests which will be adversely affected by divestiture. It is a regulated utility serving the gas and electric needs of most of northern and central California.

Movant presently purchases approximately 1.1 billion cubic feet of natural gas per day from El Paso, approximately .98 billion cubic feet of natural gas per day from Pacific Gas Transmission Company and an average .683 billion cubic feet of gas per day from California production.

However, its ability to meet its present demands will drop to an alarming level by the end of this decade unless it finds additional sources not only to meet its present needs but its future needs as well.

Additional sources of gas must be found to meet California requirements. Yet, the nation is faced with a critical shortage of gas.

IV

THIS MOTION IS CONCERNED ONLY WITH THE REMEDY UNDER PRESENT CIRCUMSTANCES AND NOT WITH THE DETERMINATION THAT EL PASO VIOLATED THE CLAYTON ACT

Movant does not here defend El Paso's past conduct. El Paso violated the Clayton Act and did so, in the opinion of Movant, to maintain its then existing position as the sole

out-of-state supplier of natural gas to California. Movant was already dissatisfied with its position of major reliance on El Paso and prior to El Paso's Pacific Northwest acquisition initiated a project to bring gas to northern California from Alberta, Canada, through a 50-percent owned subsidiary of movant, Pacific Gas Transmission Company (PGT). Movant is convinced that the lack of opposition to, and interference with, this project on the part of El Paso was due to the pendency of the antitrust action. Under this umbrella, the project was successfully organized and PGT obtained the requisite authorization from the Federal Power Commission without El Paso opposition. Similarly, under this umbrella Transwestern Pipeline Company was able to reach the California market and obtained approval for and constructed a pipeline from the Permian Basin of Texas to the California boundary to sell gas to the Pacific Lighting Companies serving the vast Southern California market.

Had El Paso not been inhibited by the antitrust action then pending, it unquestionably would have opposed those two new entries into the California market. It certainly would have delayed them and might well have blocked them entirely.

This motion, therefore, recognizes that there was ample justification for the antitrust action against El Paso, the finding that it was in violation of the Clayton Act, and the order of divestiture[1] in the circumstances as they then existed. What we ask here is relief from the divestiture order because of changed circumstances.

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1. We do, however, question, as did Justice Harlan in his dissent in *U.S. v. El Paso*, 376 U.S. 651 (1964) the propriety of this Court's abandonment of the long standing and consistently followed practice in all other cases of leaving it to the District Court to fashion the remedy in the first instance.

V

CHANGED CIRCUMSTANCES ARE SUCH THAT DIVESTITURE WILL DEFEAT THE VERY PURPOSE FOR WHICH IT WAS ORDERED BY THIS COURT

As this Court has held that (a) the purpose of divestiture was to restore competition in the California market and (b) "the public interest is our sole concern," it must permit consideration of the drastically changed circumstances which establish that divestiture will harm California's competition for gas supplies and is contrary to the public interest.

A. Divestiture Cannot Restore Competition for Future Increments of California Demand

This Court ordered divestiture to restore competition between rival suppliers seeking to serve future increments of demand to California. *United States v. El Paso,* 376 U.S. 651, 660 (1964). Under today's conditions in the natural gas industry, no form of divestiture can restore the type of competition provided by Pacific Northwest in 1957. The undisputed evidence in the record presently before the District Court proves that competition for future increments of demand in the California market no longer exists. The demand for gas in California is virtually insatiable.

The Federal Power Commission has officially held that a natural gas shortage exists today. In a Statement of Policy designated Order No. 448, issued January 24, 1972, the Commission said:

> "The Commission in response to the provisions of the Revenue Act of 1971, approved December 10, 1971 (Public Law 92-178, 85 Stat. 497), concerning the restoration of the investment tax credit therein known as the Job Development Investment Credit restates that 'the natural domestic supply of the product' (natural gas) '* * * is insufficient at this time to meet the present and future requirements of the domestic economy.' The Commission has heretofore found on the basis of an

evidentiary record and hearing that there is a natural gas shortage, Area Rate Proceedings (Southern Louisiana) Docket Nos. AR61-2, *et al.*, AR69-1; Opinion Nos. 598 and 598-A (July 16, 1971, September 9, 1971, respectively). As indicated in Order No. 437A-4 issued November 29, 1971: 'This Commission has been confronted with conclusive evidence demonstrating a gas supply shortage. Every indication is that such a shortage will continue into the near future.'" [37 Fed. Reg. 2502]

On March 9, 1972 in *Distrigas Corporation*, Opinion No. 613, ... FPC ....., the Federal Power Commission once again discussed the gas supply shortage. It there said:

"The United States is running dangerously short of natural gas. . . .

• • •

The production and deliverability problems associated with the decline in reserves has now reached such critical proportions that the interstate pipeline systems cannot satisfy the requirements of its existing customers." Slip Opinion p. .....

Later in its opinion the Commission said:

"The FPC staff estimates that between 1971 and 1990, the United States will require more gas than will be available. These levels of 'unsatisfied demand' are foreseen even after liberal allowances for pipelines imports, LNG imports, coal gas, Alaskan gas and reformed gas.

• • •

"The natural gas industry . . . has committed substantial resources to the development of Alaskan and Arctic gas." Slip Opinion p. .....

Furthermore, it is undisputed in the record before the District Court that there are no uncommitted gas reserves in the lower forty-eight states available to support a new project to serve a future increment of California demand.

Competition, in the sense referred to by this Court in *U.S. v. El Paso*, no longer exists and is unlikely ever again to exist. No competitive hearings to serve California have been held before the FPC since the *Gulf Pacific* case filed in 1963. The entire natural gas pipeline industry is having difficulty in obtaining domestic natural gas in the volumes required to enable it to serve existing markets.

Divestiture will not create competition for it cannot create new uncommitted reserves which can supply future increments of the California demand. Competition exists today only for new reserves. Markets compete for supplies; suppliers are not competing for markets.

B. Divestiture Will Reduce the California Market's Competitive Position in the Struggle for New Reserves

The undisputed evidence before the District Court shows that all pipelines are frantically seeking reserves to bolster their failing supplies and give hope of meeting some of their increased demands. Potential reserves in Alaska and the far reaches of Canada, its Northwest Territories and even its Arctic Islands are the subject of intensive gas acquisition efforts by major pipeline systems and gas distribution companies. Millions of dollars are being committed merely for the chance to contract for the gas when discovered and developed.

According to an article in *The Oil and Gas Journal*, as long ago as October 25, 1971, U.S. utilities had pledged advance payments of some $886.6 million for exploration and acquisition of gas supplies. Of this total, payments of some $463.6 million had then been made or agreed to with producers in Canada and Alaska. A breakdown of this total is as follows:

Advance Payments Made or Agreed to By Pipeline Companies To Producers in Canada and Alaska

Utility	Advance to	($ Million) Amount	Area
Columbia Gas System	Sohio	$200.0	Prudhoe Bay
	Dome	30.0	Arctic Islands
	Panaretic	12.5	Arctic Islands
	BP Canada	25.0	E. Canada
	Total	267.5	
Consolidated Natural Gas	C. Delhi	10.0	NWT, Yukon
	Dome	10.0	Arctic Islands
Natural Gas Pipe	TransCanada	6.6	Alberta
Northern Natural	Aquitaine, Amerada, Amoco, Mobil, etc.	30.0	Alberta
	Mobil and 8 others	20.0	Alberta
	Husky, et al	2.6	Alberta
	Magnorth	9.4	Arctic Islands
	Panaretic	12.5	Arctic Islands
	BP Alaska	30.0	North Slope
	Total	104.5	
Pacific Gas & Elec.	Anderson Team	10.0	Alberta
	Numerous producers	7.0	Alberta
	Unnamed recipient	10.0	Alberta
	Inexco	5.0	NWT, Yukon
Pacific Lighting	Panaretic	20.0	Arctic Islands
Panhandle Eastern	TransCanada	4.4	Alberta
	Dome	10.0	Arctic Islands
Tenneco	Panaretic	37.5	Arctic Islands
	TransCanada	5.1	Alberta
Texas Eastern	Panaretic	12.5	Arctic Islands
Texas Gas Transmission	Canadian Delhi	10.0	NWT, Yukon
	Dome	10.0	Arctic
	Total	463.6	

The Columbia Gas System has committed a staggering $267.5 million dollars, and Northern Natural $104.5 million. The former serves the East and part of the Midwest whereas the latter serves the Midwest. Since October 1971 many more millions have been committed.

A comparison of these amounts with the net assets subject to transfer to New Company of approximately $238 million dramatically illustrates the impotence of New Company to assist California in this competition between market areas for the gas reserves of Alaska and Canada.

The acquisition of reserves and the development of the vast projects necessary to bring the reserves from these remote areas to the California market will involve the expenditure of enormous sums of money.

California needs all of the economic strength that can be marshalled on its behalf to participate on an effective level in this high stake competitive struggle by all of the United States markets for adequate supplies of gas.

Divestiture will deal a heavy blow to California's competitive position. In simple terms, it will reduce the economic muscle of the forces available to California in this competitive struggle.

C. The Fracturing of El Paso Will Result in Two Separate Entities Each Less Effective in the Competitive Struggle Than the Present El Paso Corporation

In the event of divestiture, the remaining El Paso system would have no pipeline connection to the Canadian gas reserves. The divested company (New Company) would be a far less effective competitor for Canadian reserves than El Paso as it is presently constituted. Competition for Canadian reserves requires enormous financial commitments which the New Company would not be able to support. New Company would be approximately the same size as Colorado Interstate Gas Company (CIG). That company's experience as testified to before the District Court by its witness Mr. Pelican has been that one of its size

is unable to compete for reserves literally in its own backyard against one of the major pipeline companies, Panhandle Eastern Pipeline Company (Panhandle). Panhandle acquired reserves in eastern Colorado simply because it outbid CIG. New Company would completely lack even the ante required to play in the high stake Canadian competitive struggle.

VI

CHANGED COMPETITIVE CIRCUMSTANCES REQUIRE A REVIEW OF THE REMEDY

When a violation of the antitrust laws has been found after protracted litigation in a complex situation, the objective is to fashion a remedy designed to restore and preserve competition.[2]

Once the remedy has been prescribed the Court still has not only the power but the duty to modify its judgment where the original need has disappeared[3] or where such modification is in the public interest.[4]

In *United States v. Swift & Co.*, et al., 286 U.S. 106 (1931) Mr. Justice Cardozo said, "We are not doubtful of the power of a court of equity to modify an injunction in

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2. cf. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958) for the policy behind the protection of competition in Sherman Act cases.

3. *Milkwagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941), deals with the power to modify injunctive relief but the principle is applicable to this discussion. *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178 (1948) indicates that there is a duty to modify orders whose reach has become too broad.

4. The Government's Briefs to the Supreme Court in *United States v. Armour & Co. and General Host Co.*, filed February 5, 1970 and in *United States v. Armour and Greyhound Co.*, filed in March 1970 indicate that the Government itself recognizes a duty to review periodically all antitrust decrees and to seek modification where such is in the public interest.

adaptation to changed conditions though it was entered by consent." (p. 114). Regardless of whether the decree has been entered after litigation or by consent, "In either event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." (pp. 114-115).[5]

The cases cited below deal with modification of injunctive remedies in the Sherman Act cases involving conspiracies and restraints of trade. The principles are even more obviously applicable to remedies ordered in civil actions brought under the Clayton Act.

None of these cases is clear authority for altering the remedy of divestiture in the *El Paso* case, but they indicate a willingness to examine changed circumstances and new conditions in evaluating a previously prescribed remedy.

VII

THE DISTRICT COURT SHOULD BE PERMITTED TO ADOPT A REMEDY OTHER THAN DIVESTITURE IF IT WOULD BETTER SERVE THE PURPOSES OF THE COURT'S DECISIONS HEREIN

Relief from the strictures of the mandate to enable the District Court to fashion a remedy more in keeping with the basic purpose of this Court's prior decision herein will not unduly delay the culmination of this long, drawn-out litigation. Very little additional evidence, if any, would be required to enable the District Court to determine whether the circumstances have changed to such an extent to make an alternative remedy more appropriate. One effective

5: In the cited case, however, the court rejected the particular modification of the remedy (injunction) decreed below because the modification permitted the defendant packers to use their facilities to get the same unfair advantage over competitors which had led to the original injunction.

alternative remedy would be retention of the properties by El Paso with the following conditions:

A. El Paso is prohibited from opposing any project to bring additional gas to California;

B. El Paso shall agree to transport under contract such volumes of natural gas as may be acquired by any party for resale in California and make such additions to its system as are necessary for the purpose.

Such a remedy would preserve the economic weight of the combined companies and enable El Paso to play a vigorous role in behalf of the California market in the competition for reserves. Additionally, it would transport gas to California if others were able to acquire the reserves required to support such transportation. In this manner, the California market would be in a strong competitive position and hence assured that it will at least have a reasonable opportunity to acquire a fair share of future discovered gas in competition with the economic weight of such giants as those who have already committed $267.5 million for gas to come from Alaska, the Arctic Islands and other distant areas of Canada.

On the other hand, the District Court on review of the evidence may conclude that divestiture is still the appropriate remedy and select a purchaser from among the applicants for acquisition.

CONCLUSION

For the reasons set forth above, Movant respectfully submits that it has shown compelling reasons for reconsideration of the remedy to be applied for El Paso's violation of the antitrust laws and requests this Court, acting

under its *plenary* power in respect to its own mandates, to modify its mandate in *Utah v. El Paso* to provide, in effect, that the District Court should order divestiture *or such other remedy as it may find more appropriate* in the circumstances as they exist today.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Motion For Modification of Mandate is presented in good faith and not for delay.

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